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692-313—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 173

GARNETT R. DAVIS, PETITIONER

v.

THE TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 33–42)[1] is reported at 214 F. Supp. 229. The opinion of the court appeals (Pet. App. 1a) is reported at 313 F. 2d 959.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1963. The petition for certiorari was filed on May 31, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the printed record in the court of appeals which is part of the record before this Court.

QUESTION PRESENTED

Whether, in the circumstances of this case, laches barred petitioner's suit challenging the validity of his removal from government employment.

STATEMENT

Petitioner, a veteran's preference eligible, was a Safety Engineer (Grade GS–7) employed by the Tennessee Valley Authority (TVA) until his final dismissal on February 6, 1957 (R. 34). Petitioner appealed this termination to the Fifth Regional Office of the United States Civil Service Commission. On March 7, 1957, the Regional Office sustained the termination and on August 2, 1957, the Board of Appeals and Review of the Civil Service Commission affirmed the decision of the Regional Office (R. 34). On November 8, 1957, the Chairman of the Board of Appeals and Review denied petitioner's request to reopen and reconsider his case. On June 12, 1959, petitioner filed suit in the Court of Claims for salary allegedly due as a result of his dismissal. The Court of Claims dismissed the suit in June 1960 on the ground of lack of jurisdiction.

On May 10, 1961—more than three and half years after he had exhausted his administrative remedies and 11 months after dismissal of the suit brought in the Court of Claims—petitioner brought this action against the TVA in the district court seeking a declaratory judgment that his dismissal was invalid. Petitioner, in his complaint, failed to join members of

the Civil Service Commission and the court held the action subject to dismissal for failure to join indispensable parties.[1] Leave to amend the complaint was denied on the ground that the action was, in any event, barred by laches, and summary judgment was granted dismissing the complaint.

The court of appeals affirmed *per curiam* on the authority of the opinion of the district court.

ARGUMENT

The court below correctly determined that petitioner's action was barred by laches under the principles laid down by this Court in *United States ex rel. Arant* v. *Lane*, 249 U.S. 367. In *Arant* a claim for reinstatement made less than two years after a government employee's dismissal was held barred by laches (*id.* at 372):

> Such a long delay must necessarily result in changes in the branch of the service to which [the employee] was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

Here, although petitioner's administrative remedies were exhausted when the petition to reopen his case

[1] Respondent agrees with the courts below that petitioner failed to join indispensable parties. However, since we believe that laches are a complete bar to the action, we shall confine our argument here to that issue.

was denied by the Board of Appeals and Review of the Civil Service Commission on November 8, 1957, he waited 19 months before filing an action in the Court of Claims. When this action was dismissed for lack of jurisdiction after pending for 12 months, petitioner delayed an additional 11 months before filing this action. As a result of these delays, petitioner's action, if successful, would cause serious prejudice to respondent. Petitioner was receiving an annual salary of $8,495 when dismissed (R. 24) and, if he were reinstated, he would have a claim for back salary in the amount of approximately $36,000 as of the date this action was filed and over $52,000 as of the present time.

Petitioner suggests (Pet. 5) that complete inaction by the claimant is a prerequisite for the application of the laches doctrine. In *Arant*, however, the employee asserted that he had made "every reasonable effort" to obtain restoration prior to filing suit. This Court's response was that laches was a bar because "[u]nder circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to *effectively* assert his claim for reinstatement to office for almost two years" (emphasis added). 249 U.S. at 372.

The actions petitioner took were neither prompt nor effective. He took no action whatsoever after his administrative appeal was denied until the filing of his action in the Court of Claims 19 months later. Since this suit itself could properly have been dis-

missed for laches,[3] it cannot serve as an argument against dismissing a subsequent suit for laches. Moreover, the suit was dismissed because the Court of Claims lacked jurisdiction over respondent. Since petitioner's attempt to assert his claim was defective, it is no answer to the defense of laches to the suit that was ultimately filed by petitioner in the district court. See *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A. D.C.), certiorari denied, 361 U.S. 841; *Benson* v. *Zahner*, 289 F. 2d 756 (C.A. D.C.), certiorari denied, 366 U.S. 904.

Upon dismissal by the Court of Claims, petitioner waited another 11 months before filing the instant suit. In the district court, petitioner alleged that this additional delay was due to financial embarrassment. This explanation, however, does not explain the earlier delay which in itself barred any legal action. And it is settled that inability to bear the costs of litigation does not, in itself, justify delay in the assertion of a claim. *Leggett* v. *Standard Oil Co.*, 149 U.S. 287, 294; *Wolf Mineral Process Corp.* v. *Minerals Separation North American Corp.*, 18 F. 2d 483, 490 (C.A. 4), certiorari denied, 275 U.S. 558; *Gillons* v. *Shell Co.*, 86 F. 2d 600, 606 (C.A. 9), certiorari denied, 302 U.S. 689.

Nor does *Evans* v. *Leedom*, 265 F. 2d 125 (C.A. D.C.), certiorari denied, 361 U.S. 935, support petitioner's position. The court there expressly held

[3] In *Norris* v. *United States*, 257 U.S. 77, the Supreme Court held that an eleven-month delay was sufficient to constitute laches.

that mere contemplation of legal action is not a bar to the defense of laches when suit is ultimately brought. The court in *Evans* assumed that delay was excusable if an employee deferred the filing of suit to await the outcome of another case involving similar issues. Petitioner has not offered a similar justification for his delay. The Court of Claims cases to which petitioner points (Pet. 5) are equally inapposite.[4]

Petitioner asserts (Pet. 3) that respondent's motion for summary judgment should have been denied because "petitioner in his affidavit in support of his opposition to the motion for summary judgment set forth material issues of fact which were in controversy and attacked the truthfulness of officials employed by respondent." The alleged material issues of fact and the attack upon the truthfulness of respondent's officials both relate solely to the merits of the termination action taken against the petitioner (R. 29–32). The courts below, however, held that, regardless of the merits, petitioner's complaint is barred by laches. On that matter, there is no disputed issue of fact.

[4] The plaintiff in *Bigelow v. United States*, 122 Ct. Cl. 632, acted as his own attorney and relentlessly pursued his attempts at relief through the federal courts. *Winsberg v. United States*, 120 Ct. Cl. 511, involved an overtime compensation claim where delay was not prejudicial to the government since no double salary had to be paid. Intentional delay pending determination of another suit involving similar facts and issues was held, as suggested in *Evans v. Leedom* (discussed in the text above), to bar laches in *Kaufman v. United States*, 118 Ct. Cl. 91. In *Simon v. United States*, 113 Ct. Cl. 182, laches were held inapplicable to a case involving recovery of salary for the time between illegal dismissal and reinstatement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

GOVERNMENT PRINTING OFFICE: 1963